STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant, Supreme Court No. 123760

v

TRAJEE SHAHEER MAYNOR,

Defendant-Appellee.

/

Court of Appeals No. 244435
Circuit Court No. 2002-185279-FC

BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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STATEMENT OF JURISDICTION

Defendant accepts plaintiff's statement of jurisdiction as accurate and complete.

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QUESTIONS PRESENTED

I. IS THE STATUTORY LANGUAGE REGARDING FIRST DEGREE CHILD ABUSE INSUFFICIENT TO APPRISE THE JURY OF THE REQUIRED MENS REA OF THE CRIME, AS FIRST DEGREE CHILD ABUSE IS A SPECIFIC INTENT CRIME?

Plaintiff says, "NO"
Defendant says, "Yes"

Court of Appeals says,	First Degree Child Abuse is a specific intent crime.
Circuit Court says,	First Degree Child Abuse is a general intent crime.
District Court says,	First Degree Child Abuse is a specific intent crime.

II. MUST THE TRIAL COURT INSTRUCT THE JURY AS TO SPECIFIC INTENT?

Plaintiff says, "NO"
Defendant says, "Yes"

Court of Appeals says,	First Degree Child Abuse is a specific intent crime.
Circuit Court says,	First Degree Child Abuse is a general intent crime.
District Court says,	First Degree Child Abuse is a specific intent crime.

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STATEMENT OF FACTS

This case arose from the tragic deaths of two young children who were left in a car by their mother. Defendant, Tarajee Shaheer Maynor, was charged with two counts of first-degree felony murder, MCL § 750.316(1)(b), based on the underlying felony charge of first-degree child abuse, MCL § 750.136b(2). On July 10, 2002, 46th District Court Judge Stephen C. Cooper bound over defendant on the lesser charge of involuntary manslaughter, MCL § 750.321. The People appealed, and Oakland Circuit Judge Wendy Potts reversed the District Court and reinstated the charges on October 1, 2002, after a September 25, 2002 hearing. On appeal to the Court of Appeals, the Court held that First Degree Child Abuse was a crime subject to the application of the felony murder statute. However, the Court also held in accord with its past precedent, that First Degree Child Abuse was a specific intent crime. This Supreme Court granted leave to appeal on the prosecutor's application.

The underlying facts are not in particular dispute for the purposes of this appeal. However, a brief recitation will be provided for continuity.

At the preliminary examination before 46th District Court Judge Stephen Cooper, the parties stipulated that Doctor Alexandrov, the medical examiner, would testify that three-year-old Adonnis Maynor and ten-month old Acacia Maynor, defendant's children, died from hyperthermia or heat exposure on June 28, 2002, after being left in a Dodge Neon. (Defendant's Appendix, 9a, 81a).

Defendant had scheduled an appointment at approximately 4 p.m. of that day for a touch up (relaxer), wash, blow dry and curl at a local salon. (Defendant's Appendix, 13a, 21a). During the entire time defendant was in the salon, she did not talk about her children or ask to go outside. (Defendant's Appendix, 19a).

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When defendant found her children dead in her vehicle, she concocted a story about being kidnapped and raped, which was eventually proven false (Defendant's Appendix, 34a-52a). When asked why she would make up the story about being abducted, defendant responded, "So that I wouldn't appear to be a horrible person, someone who left their children in a hot car." (Defendant's Appendix, 63a). When asked if she had anything else to write down, defendant added: "I had never left them in the car before and I didn't know (was too stupid to know) that they would die. I didn't want them to die." (Defendant's Appendix, 63a, 71a-72a).

District Judge Cooper held that first-degree child abuse was a specific intent crime based on *People v Gould, infra*, and refused to bindover defendant on the felony murder charge, opting instead for the lesser offense of involuntary manslaughter (Defendant's Appendix, 87a-90a).

The People appealed, and the parties presented arguments at Oakland County Circuit Court on September 25, 2002 (Defendant's Appendix 92a). Oakland Circuit Judge Wendy Potts reinstated the charges of felony murder, finding that first-degree child abuse was a predicate felony as a general intent crime.

Plaintiff's interlocutory appeal followed. The Court of Appeals, in a two to one published decision, held that First Degree Child Abuse was a specific intent crime; however, the Court found that there adequate evidence of First Degree Child Abuse, even with the specific intent requirement, to reinstate the charge against defendant (Defendant's Appendix, 149a-150a). Chief Judge Whitbeck concurred in the result; however, he dissented from the holding that First Degree Child Abuse was a specific intent crime (Defendant's Appendix, 152a).

This Supreme Court granted leave on the plaintiff's application for leave to appeal (Defendant's Appendix, 167a).

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ARGUMENT

I. THE STATUTORY LANGUAGE REGARDING FIRST DEGREE CHILD ABUSE IS INSUFFICIENT TO APPRISE THE JURY OF THE REQUIRED MENS REA OF THE CRIME, AS FIRST DEGREE CHILD ABUSE IS A SPECIFIC INTENT CRIME.

Standard of Review:

Questions of statutory interpretation are reviewed de novo. *People v Stone Transport, Inc.*, 241 Mich App 49, 50; 613 NW2d 737 (2000).

Analysis:

The statutory language is insufficient to apprise the jury of the required mental state to commit First Degree Child Abuse. The first-degree child abuse statute, MCL § 750.136b(2), states, in relevant part, that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." The language "knowingly or intentionally" clearly denotes a specific intent crime to the trained legal mind; however, the jury would likely not understand the significance of the language without a supporting instruction in specific intent.

First Degree Child Abuse is a specific intent crime

Preliminarily, it must be decided, once and for all, whether the crime itself is, in fact, a specific intent crime.

The district court, as well as the Court of Appeals, has held just that. The district court, relying upon *People v Gould,* 225 Mich App 79; 570 NW2d 140 (1997), in which the Court of Appeals held that first-degree child abuse was a specific intent crime, held that the People failed to establish probable cause that Defendant formulated the requisite specific intent contemplated by MCLA § 750.136b(2) by knowingly or intentionally causing the result. (Defendant's Appendix, 87a, 88a).

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The Court of Appeals agreed with the reasoning of the district court, and adopted the case law cited as controlling.

Underlying history of specific intent in child abuse cases

The Court of Appeals held in *Gould* that first-degree child abuse is a specific intent crime, although this Court, in subsequently denying the defendant in *Gould* leave to appeal, ruled that this holding by the Court of Appeals was dictum. 459 Mich 955; 590 NW2d 572 (1999). Consequently, the circuit court held that the holding by the Court of Appeals in *Gould* that first-degree child abuse is a specific intent crime was not precedentially binding on either Judge Cooper or the Circuit Court.

Defendant submits that the characterization of the holding by the Court of Appeals *in Gould* as dictum is merely the beginning, not the end of the inquiry, which is required to determine whether first-degree child abuse is a specific intent crime.

The Court of Appeals in *Gould* did not reason *a priori* in holding that first-degree child abuse is a specific intent crime. Rather, the Court of Appeals reached its conclusion only after a detailed analysis grounded in well-reasoned precedents. The holding of the Court of Appeals in *Gould* was not dictum as that term is commonly understood, that is, a statement or observation of law in a judicial opinion unnecessary or unrelated to the Court's actual holding. The holding only subsequently became dictum, based upon this Court's ruling that it was unnecessary in light of the Court of Appeals' affirmation of the trial court's denial of the motion for directed verdict on the grounds that the evidence at trial was sufficient for conviction even under a specific intent standard. *Id.* at 955.

Even if the ruling in *Gould* was dicta, this Court should adopt the reasoning of the case, as did the Court of Appeals in the instant case. The holding of Court of Appeals in *Gould* was based upon well established case law and legal reasoning, as was thus adopted by the Court of

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Appeals here, dicta notwithstanding. In concluding in *Gould* that first-degree child abuse is a specific intent crime, the Michigan Court of Appeals relied primarily on *People v. Lerma,* 66 Mich App 566; 239 NW2d 424 (1976). The *Gould* Court stated that "... this Court has repeatedly concluded that a crime that is required to be committed 'knowingly' is a specific intent crime," and quoted as follows from *Lerma:*

> Specific intent has been defined as "meaning some intent in addition to the intent to do the physical act which the crime requires," while general intent "means an intent to do the physical act - or, perhaps, recklessly doing the physical act - which the crime requires." LaFave & Scott, Criminal Law, p. 343.
>
> A much more workable definition would center upon the several mental states set forth in the various proposed criminal codes. *Analyzed in this fashion, specific intent crimes would be limited only to those crimes which are required to be committed either Purposefully" or "knowingly,"* while general intent crimes would encompass those crimes which can be committed either "recklessly" or "negligently." *Thus, in order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur,* whereas in a general intent crime, the prohibited result need only be reasonably expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result. (emphasis supplied). *Lerma, supra,* at 569570, as quoted in *Gould, supra,* at 85.

Based upon this standard, the Court of Appeals in *Gould* held that the term "knowingly" in the first-degree child abuse statute "would fall within the *Lerma* definition of specific intent." *Id.* at 86.

Similarly, in *People v Sherman-Huffman,* 241 Mich App 264; 615 NW2d 776 (2000), aff 466 Mich 39; 642 NW2d 339 (2002), the Court of Appeals again considered the issue of specific intent within the context of the child abuse statute, only this time with respect to a defendant's conviction on a charge of third-degree child abuse. The Court stated that the statutory language defining the offense of third-degree child abuse was "substantially similar" to that defining first-

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degree child abuse and concluded that third-degree child abuse is a specific intent crime. Again, the Supreme Court, on appeal, found that this holding as to specific intent was dictum, since it was unnecessary to determine that issue for the reason there was sufficient evidence under either a specific intent or general intent standard to support the defendant's conviction. 466 Mich 39, 40, n. 2 (2002).

Defendant emphasizes that the Court of Appeals *in Sherman-Huffman,* just as in *Gould,* stated that it *deemed itself bound by Lerma* to hold that the statute under consideration required specific intent:

> *In People v. Gould,* 225 Mich App 79, 84-85; 570 NW2d 140 (1997), Iv den 459 Mich 955 (1999) (Supreme Court observing our conclusion was dicta on this point) we concluded that first-degree child abuse is a specific intent crime. In reaching this conclusion, we relied on a previous ruling by this Court that "where a statute requires that the criminal act be committed either 'purposefully' or 'knowingly', the crime is a specific intent crime." Id. at 85 (citing *People v. Lerma,* 66 Mich App 566, 569-570; 239 NW2d 424 (1976).

The *Sherman-Huffman* Court then quoted much the same language from *Lerma* quoted in *Gould.* Thus, regardless of the dicta quality of the holdings in *Gould* and *Sherman-Huffman*, the underlying reasoning and precedential case law still requires a similar outcome.

The Court of Appeals in *Gould* also relied, *Id.* at 85, 86, upon *People v American Medical Centers,* 118 Mich App 135,153; 324 NW2d 782 (1982), *cert den sub nom Fuentes v Michigan,* 104 S Ct 529, 464 US 1009,78 L Ed2d 711 (1983), in which the Court of Appeals held that a Medicaid fraud offense was a specific intent crime in that the statute required a mental state of "knowingly" committing the offense:

> ... Specific intent is a nebulous concept but has been defined as the subjective desire or knowledge that the prohibited result will occur. *People v Spry,* 74 Mich App 584, 596; 254 NW2d 782 (1977), *Iv den* 401 Mich 825 (1977). To determine if a criminal statute requires specific intent, we look to the mental state

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> set forth in the statute. *People v Lerma,* 66 Mich App 566, 569; 239 NW2d 424 *(1976), lv den 396 Mich 848 (1976). Where a statute requires that the criminal act be committed either 'purposefully " or "knowingly " then the crime is a specific intent crime. Id. at* 569. (emphasis supplied). *Id.* at 153.

More recently, the Court of Appeals in *People v Whitney,* 228 Mich App 230, 255; 578 NW2d 329 (1998), expressly relied upon *Lerma* in reaffirming that "[t]o commit a specific intent crime, 'an offender would have to subjectively desire or know that the prohibited result will occur citing *Gould, supra,* at 85, quoting *Lerma, supra,* at 569.

This was precisely the argument before the Court of Appeals in the underlying appeal. As such, the Court of Appeals correctly followed not only prior case law, but also prior approved *reasoning* in determining that First Degree Child Abuse is, in fact, a specific intent crime.

1999 amendments to the act

As noted to the Court of Appeals, the only 1999 amendment of consequence to the child abuse act, which specifically relates to the offense of first-degree child abuse, was an expansion of the definition of "serious physical harm" in MCL § 750.136b(l)(f).[1]

Thus, Defendant submits that the Legislature's decision, in its 1999 amendments, to leave unmodified MCL § 750.136b(3) defining the substantive offense of first-degree child abuse, actually demonstrates that it was the *Legislature's intent to continue its classification as a specific intent crime.* The Court of Appeals released its opinion in *Gould* in 1997 two years prior to the Legislature's 1999 amendments. Silence by the Legislature following judicial construction of a statute suggests consent to that construction. *Craig v Larson,* 432 Mich 346, 353; 439 NW2d 899 (1989).

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[1] MCLA § 750.136b(l)(f), as amended in 1999, was expanded to state: "Serious physical harm" means any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, bum or scald, or severe cut.

In *Gould,* the Court of Appeals utilized the rules of construction governing the judicial interpretation of statutes to give effect to the Legislature's intent. It concluded that since "knowingly" was not defined in the statute, it was appropriate under *People v Gregg,* 206 Mich App 208, 211; 520 NW2d 690 (1994), to consult with a dictionary for the meaning of the term. Upon consultation with a dictionary, the Court determined that "knowingly" and "intentionally" were synonymous and that it was the Legislature's intent to make first-degree child abuse a specific intent crime. *Id.* at 84. Had the Legislature intended to statutorily override the *Gould* rationale by supplying a definition for "knowingly" or "intentionally" in such a way as to make first-degree child abuse a general intent crime, it surely would have done so as part of its 1999 amendments.[2] The fact that it did not, even while making amendments to other sections of the overall child abuse act, can be fairly interpreted to mean that it clearly intended that the offense remain a specific intent crime. *See generally People v Langworthy,* 416 Mich 630, 642-645; 331 NW2d 171 (1982).

Accordingly, the Court of Appeals properly determined that first-degree child abuse is a specific intent crime for the reason that the precedents relied upon by the Court of Appeals in *Gould* and *Sherman Huffman* are binding and dictate such a result and hence adopted that rationale as the Court's own.

Knowingly defined

Even looking to the plain language of the statute, the People's argument falls short.

[2] It should also be noted that the 1997 decision by the Court of Appeals in *Gould* was not the first indication to the Legislature that Michigan appellate courts viewed the first-degree child abuse statute as a specific intent crime. In *People v Todd,* 196 Mich App 357, 361; 492 NW2d 521 (1992), vac 441 Mich 922, 497 NW2d 188 (1993), another panel of the Court of Appeals stated, also in dictum, that "[w]e agree that first and third-degree child abuse are specific intent crimes."

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"Knowingly," as the modified form of the adverb knowing, has been defined by Black's Law Dictionary, 7th Ed., as "Having or showing awareness or understanding; well informed," and as "Deliberate, conscious." Black's Law Dictionary, 7th Ed. p. 876.

Judicial interpretations of the exact same language in sister jurisdictions bears out the contention that the term "knowingly" elevates First Degree Child Abuse to a specific intent crime. In a Texas case, *Westfall v State,* 782 SW2d 951 (1990, Tex App), a similar statute defining an offense as "intentionally or knowingly" engaging in conduct that causes serious injury to child fourteen years of age or younger was interpreted to mean that the defendant must actually intended harm to a child, rather than merely intending to engage in conduct that eventually results in harm.

Similarly, another court from the traditionally judicially conservative State of Texas found that a similarly worded statute created a specific intent type crime. In *Banks v State*, 819 SW2d 676 (1991, Tex App), the court reasoned that injury to a child is result-oriented crime. Thus, injury to the child is "specific result" offense requiring a culpable mental state related to the intention of the results of the act (injury), rather than the nature of circumstances surrounding the charged conduct. This case is particularly instructive in that Michigan's statute is also an injury specific statute, apportioning first-degree liability in cases where harm, physically or mentally, actually occurs to the child. Our statute, like the one in *Banks, supra*, places the emphasis on the result, not the act. Thus, reading our statute in conjunction with almost identical statutes from other states reveals that our injury specific statue is in fact a specific intent crime.

Model Penal Code

The federal courts have also grappled with the meaning of the term "knowingly" in ambiguous statutory provisions. In *United States v Georgia*, 279 F3d 384 (2002), the court sought to determine the meaning of the word "knowingly" within the context of the Federal

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Sentencing Guidelines. Because the statute did not define the term, the court looked to the Model Penal Code. The Code defined "knowingly" as:

> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, *he is aware that it is practically certain that his conduct will cause such a result.* [*Id.*][Emphasis added.]

Similarly in the case at bar, the legislature has not defined the term "knowingly." As such, a jury instruction such as the one at issue is wholly inadequate to apprise the jury of the required mens rea of the crime.

Other jurisdictions

The interpretation that child abuse statutes must necessarily contain an element of malice such that improper motives such as the infliction of pain, rather than mere negligence, is shared by other jurisdictions as well.

In *Mullen v United States*, 263 F2d 275 (1958)(applying DC law), the court held that in a case where a mother chained her children for their "protection," a statute making it a crime to torture, cruelly beat, abuse, or otherwise willfully maltreat a child required a showing by the prosecution of something worse than good intentions coupled with bad judgment - in that case, an evil state of mind.

Similarly, in *Carson v United States*, 556 A2d 1076 (1989), a prosecution for cruelty to children where the defendant whipped her four children with electrical cord when they denied any knowledge of $8 found missing from her dresser, the court found that even though its version of the offense of cruelty to children was *general intent crime* it still required a showing

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of malice, meaning that a parent must act out of the desire to inflict pain rather than out of genuine effort to correct child, and that the finding of whether a parent acted with malice in disciplining child was factually specific and the trial court's findings would be given great deference.

Also, a Florida Court has held that negligence alone could not elevate the crime of child abuse to the higher level crime of aggravated abuse. In *Jakubczak v State* 425 So 2d 187 (1983, Fla App D3), a mother left her nine-week-old child with her alcohol and drug abusing husband who had hurt the child previously while in his care. The court there found that while the acts were certainly negligent, they did not rise to the higher level of aggravated abuse without some showing of intent. This is especially poignant in that the case concerns a negligent act like that in the case at bar, and come from the only jurisdiction that has apparently applied felony murder to child abuse cases. See *State v Carwile* 615 So 2d 748 (1993, Fla App D2).

The wealth of case law from other jurisdictions shows that the general consensus is that negligent behavior is justification for involuntary manslaughter, no more. As such, the jury would be confused by the statutory definition as used in a jury instruction, which does not apprise the jury of the requirement of specific intent. See *State v Parks*, 253 Neb 939; 573 NW2d 453 (1998)(Defendant's state of mind is sole factor which differentiates misdemeanor negligent child abuse from felony knowing and intentional child abuse); *State v Byrd*, 309 NC 132; 305 SE2d 724 (1983)(Violation of child abuse statute proximately resulting in death of child would support conviction of involuntary manslaughter). Clearly, the mens rea of First Degree child abuse must be higher than simply intending to do an act, as suggested by the wealth of persuasive case law. Such indication is not embodied in the statutory language of criminal jury instructions.

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Had the Legislature intended to strike such a bold stance from that of its sister states and make First Degree Child Abuse a general intent crime without recognition of the defendant's mindstate, it would presumably have done so with appropriate and definite statutory language, rather than the ambiguous language and silence in the case at bar.

Societal interest

The news is fraught with storied of parents beating their children inappropriately and cruelly. Many children fall through the social net with abusive parents. "Shaken-baby syndrome" is a household word. Nobody would argue that the extreme punishment of felony murder would apply to those violent parents who beat, scald, and burn their own children, resulting in death. However, the gross negligence and stupidity of a parent, although reprehensible and likely deserving of punishment, has never been held to the exacting punishment reserved for those who intentionally strike, beat, and torture their children.

In the case at bar, there is no greater punishment for those who intentionally scald, beat, or torture their children above that given to those who are grossly negligent or stupid in their actions. In effect, it creates a strict liability standard for poor parenting, rather than the graduating the punishment based on the evil intent of a parent. Not only does this not provide an added deterrent for poor parents to not cross the line to intentional abuse, it lumps almost any inaction by the parent into the same category as an abusive monster. Statutory construction demands that statutes be construed to avoid injustice, absurd results, or prejudice to the public interest. *People v Stephan*, 241 Mich App 482, 497; 641 NW2d 252 (2000). To interpret the statute as did the circuit court, plaintiff, and the dissent in the underlying appeal would do all three.

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An example of this absurdity can be seen from the unintended fallout from a decision that the statute only requires a general intent to do an act. Take for example the hypothetical case of

a mother who leaves her child unattended in a bathtub, with only a few inches of water in the tub. An unexpected telephone call occurs, and this otherwise attentive and loving mother leaves the bathroom for only a minute to answer the call. While she is on the telephone, perhaps receiving tragic or disruptive news, the child reaches forward for a bar of soap or bath toy and slips face first into the water. Even though only a few inches deep, it is enough to drown the small child in precious minutes. When the call is over, the mother returns to discover, to her horror, that her child has drowned *in only inches of water*. Under the People's and the circuit court's expansive reading of the statute, this grieving mother would be exposed to first-degree felony murder charges for her arguably minimally negligent act. This is not what the Legislature intended.

Another absurd example occurs where a mother may leave her child in the car momentarily while she runs to the mailbox to pick up the mail. As soon as she has opened her door, the child mischievously engages the gear shift. As she turns back to the automobile, only a few steps away, she sees it roll into traffic where it is broad-sided, causing the death of the child to the mother's horror. Again, under the People's and the circuit court's expansive reading of the statute, this grieving mother would be exposed to first-degree felony murder charges for her arguably minimally negligent act. This is not what the Legislature intended.

Perhaps the most egregious, and common, example of plaintiff's absurd interpretation of the statutes at bar occurs from seatbelts. The law requires that a parent buckle up children up to a certain age. Failing to do so, or perhaps failing to properly setup a car seat, could lead to certain death in an accident. It can hardly be argued that death or injury would not be the natural consequences of failing to buckle up a child. However, again, the negligence in doing so would equate to First Degree Child Abuse in under plaintiff's theory.

Legislative record.

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Further evidence evincing that the Legislature intended First Degree Child Abuse to apply only to specifically intended acts, and not act of gross negligence, can be found in the related reasoning of the felony murder statute. While the application of felony murder to the underlying offense is not at issue in this appeal, the reasoning behind amendments to the statute shed considerable light on the legislature's intent in defining First Degree Child Abuse. The legislative history is in accord with other jurisdictions that punish only *intended* harms to the child.

Preliminarily, the actual record of the House and Senate proceedings shows no mention of any consideration for whether there would be felony murder liability for negligent omissions accept in the context of Second Degree Child Abuse, which is not at issue. See Defendant's Appendix, 168a-171a. In addition, a substitute bill, SB 979 sponsored by Senator Dinello, which appears much harsher, was not adopted and remained in the House judiciary committee until after passage of the bill at issue, SB 210.

While not controlling, some guidance may be gleaned from the legislative analysis of the bills. The House Legislative Analysis Section report on SB 210, clearly shows that first degree child abuse was included with the murder of a police officer and with murders occurring with in the drug trade as crimes to be punished by Michigan's highest penalty (Appellee's Appendix, 3b). These crimes are both crimes where actual harm (the murder) is intended by the perpetrator. Assuming that the legislature intended for First Degree Child Abuse to subject to felony murder, under plaintiff's theory, First Degree Child Abuse would be the only crime without a specific intent added.

Perhaps the most striking evidence of the intent that the harm must come from an intentional act *designed to cause* injury is through the examination of the arguments for the bill. The arguers in support clearly identify, "Killing a child in the course of beating that child," as

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their only example of such behavior (Appellee's Appendix 4b). Further, it goes on to state enacting the higher penalties would "serve to deter at least some of those who might otherwise act on their violent urges," (Appellee's Appendix 4b). Obviously the statute was designed to *thwart violent behavior*, rather than negligent, or even reckless omissions.

Further into the analysis a detractor argues that the bill does not consider actors who are not directly involved. The supporters counter:

> The bill focuses on first-degree-child-abuse, which *does not address omissions*, but rather deliberate actions that caused serious harm to a child. Thus, presumably, a person would have to have participated in a child's beating to be prosecuted for first-degree-murder under the bill.[Appellee's Appendix 4b][Emphasis added]

Again, this clearly shows that the legislators intended this act to thwart violent abusers, rather than to promote model parenting with strict liability.

While the Senate Fiscal Agency analysis is much more devoid of specific examples, it does begin with the strong language, "The bill would subject those people who committed *heinous murders*, though not necessarily premeditated, to the most severe [punishment]." (Appellee's Appendix 24b). Again, the intent was to punish, and perhaps prevent, violent deaths.

Heinous has been defined as, "Utterly reprehensible or evil; odious; abominable." Random House Webster's College Dictionary, 2nd Revised Ed. The use of such harsh language in describing the rationale of the bill evinces again the intent that the bill was not designed to punish negligence, nor even reckless behavior, but *evil*. This author is unaware of any similar situation where someone's acts, not specifically intended to harm another, has been considered *evil,* even if harm actually occurs. Therefore, there must be a specific intent to harm, which was the intent of the legislature.

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While defendant's actions in the current situation are certainly poor, such omissions do not amount to the level of violent beatings or heinousness that the legislature intended to proscribe. As such, the statutory language is not sufficiently clear to apprise the jury that a specific intent to harm, in other words, a heinousness, is required - not just recklessness or gross negligence.

The Court of Appeals in *People v Henry,* 239 Mich App 140, 144; 607 NW2d 767 (1999), appeal den 463 Mich 863; 617 NW2d 691 (2000), in considering whether the discharge of a firearm in an occupied structure was a specific or general intent crime, stated as follows:

> "Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself" *People v Lardie,* 452 Mich 231, 240; 551 NW2d 656 (1996). "'[T]he most common usage of "specific intent" is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime.'" *People v Langworthy,* 416 Mich 630, 639, n 9; 331 NW2d 171 (1982), quoting LaFave & Scott, Criminal Law § 28, p. 202. A general intent crime only requires proof that the defendant purposefully or voluntarily performed the wrongful act. *Lardie, supra* at 241.[*Henry, supra*, at 144.]

Since the statute at issue in *Henry* required proof that the defendant committed the *actus reus of* intentionally discharging a firearm, and did not "require proof of the intent to cause a specific result or the intent that a specific consequence occur as a result of the performance of the prohibited act," the Court concluded that it was only a general intent crime. *Id.* at 145.

Similarly, this Court in *People v Beaudin,* 417 Mich 570, 575; 339 NW2d 461 (1983), analyzed a criminal statute, which prohibited certain acts to a railroad track willfully endangering the lives of persons working or traveling on the railroad:

> Performance of the physical act proscribed in the statute is not enough to sustain a conviction. The act must be coincident with an intent to bring about the particular result the statute seeks to prohibit. In order for Beaudin to be guilty of this crime, he must

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> have removed the bolts from the railroad with the *specific intent* to endanger lives...[*Beaudin, supra*, at 575] [Emphasis in original]

The *Beaudin* Court concluded that the statute prohibited a specific intent crime and that it was reversible error for the trial court to not so instruct the jury. *Id.* at 576.

Assuming that first-degree child abuse is a intent crime, the crucial issue is not whether Defendant intentionally committed the *actus reus* of leaving her two children unattended in a locked automobile for a period of approximately three and one half hours while the temperature was in the 80's. Rather, the crucial issue is whether at the time of committing this *actus reus,* she formulated a specific mental intent, which was beyond the intent required with respect to the *actus reus,* to cause a specific result or specific consequence prohibited by the first-degee child abuse statute. Cast in terms specifically tailored to the first-degree child abuse statute, the question is: Did Defendant formulate a special mental intent, which was beyond the general intent to commit the *actus reus,* to cause the specific proscribed result or consequence under the first-degree child abuse statute of "serious physical or serious mental harm" to her children? MCLA § 750.136b(2).

Moreover, the recklessness and indifference attributed to Defendant in the People's argument at the preliminary examination at the close of proofs is precisely the type of mental state rejected by the Court of Appeals as insufficient to constitute specific intent under any circumstances *People v Whitney,* 228 Mich App 230; 578 NW2d 329 (1998). In no uncertain terms, the *Whitney* Court emphatically stated that "...we conclude that Michigan law clearly provides that *no degree of recklessness or even deliberate ignorance* suffices to establish the intent necessary to establish a specific intent crime." (emphasis supplied). *Id.* at 257.

In *People v Lardie,* 452 Mich 231, 251-252; 551 NW2d 656 (1996) this Court noted the required mens rea for a general intent crime in the context of a negligence homicide situation:

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> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
>
> (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind *it must be apparent that the result is likely to prove disastrous to another.* [citing *People v Orr,* 243 Mich 300, 307; 220 NW 777 (1928)].

Similarly, in *People v Harris, supra,* 159 Mich App at 406, for instance, the Court of Appeals stated "[t]he crime of involuntary manslaughter does not require that the defendant be personally aware of the danger or that he knowingly and consciously create that danger" and that "[t]he test only requires the danger to be apparent to the ordinary man."

Therefore, it imperative that the court instruct the jury as to the definition of specific intent. Without such an instruction, the jury would be free to base its verdict on the substantially lesser burden of general intent. While it may be apparent that the acts alleged in this case would *likely* prove disastrous, as in *Lardie* and *Orr*, this is not the standard for a specific intent crime; rather, it is the standard for negligence and recklessness embodies in lesser charges.

CONCLUSION

To the trained legal mind, the statutory language clearly indicates that First Degree Child Abuse is a specific intent crime. The district court, as well as the Court of Appeals, recognized this in the application of *Lerma*, *Gould*, and *Sherman* to the case at bar.

The language of the statute that the harm must be "knowingly or intentionally" caused clearly indicates that the harm must be knowing or intentional, not just an act. Such would create a strict liability offense for parents. Indeed, the language of general intent crimes states that only the act must be intended to be committed. As such, as a specific intent crime, the

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statutory language does not apprise the jury of its responsibility in determining whether a specific intent is required, nor does it provide adequate guidance on how to determine that intent.

This is clearly the trend in other state jurisdiction regarding child abuse cases. While there can be no doubt that child abuse is a horrible action, there must be a line drawn between the heinousness exhibit by those who burn, beat, scald, and chain their children, and those who are negligent, even reckless. While such activity is certainly not be condoned, it does not rise to level of First Degree Child Abuse. The legislature recognized this in drafting a statute that clearly indicated that First Degree Child Abuse is a specific intent crime. As such, the legislature should have the confidence that the courts will instruct the jury with the proper specific intent instruction, in accord with its laws.

RELIEF REQUESTED

WHEREFORE, Defendant, Tarajee Shaheer Maynor, respectfully requests that this Honorable Supreme Court affirm the decision of the Court of Appeals and require on remand an instruction regarding specific intent.

Respectfully submitted,

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